Sup. Ct., U. S.
FILED
AUG 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) et al., *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, et al., *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) et al., *Appellees*

On Appeal from the United States District Court for the District of Columbia

MOTION TO DISMISS OR FOR SUMMARY AFFIRMANCE BY NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I.V. SUTPHIN CO. AND FRANKEL BROTHERS & CO. INC.

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MOTION TO DISMISS OR FOR SUMMARY AFFIRMANCE BY NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., COMMERCIAL METALS CO., I.V. SUTPHIN CO. AND FRANKEL BROTHERS & CO. INC.

Appellees National Association of Recycling Industries, Inc. (NARI), Commercial Metals Co., I.V. Sutphin Co. and Frankel Brothers & Co. Inc. hereby

move, under and pursuant to the provisions of Rule 16 of the Supreme Court Rules—

(1) to dismiss the two appeals filed by appellants herein on the ground that this Court has no jurisdiction over such direct appeals from a District Court judgment under the provisions of Title 28 U.S.C. § 1253; or in the alternative,

(2) for summary affirmance of the District Court's judgment reported at 371 F.Supp. 1291 on the ground it is manifest that the issues now raised by appellants are not substantial and the decision and judgment of the District Court are plainly sound, reasonable and correct.

STATEMENT OF FACTS IN SUPPORT OF THE MOTION

Appellee NARI is the trade association for the non-ferrous metals, waste paper, textile, plastics and rubber recycling industries. Its membership consists of approximately 700 firms located throughout the United States which collect, process and utilize for manufacturing purposes the aforementioned recyclable materials. Appellees Commercial Metals Co. of Dallas, Texas, I.V. Sutphin Co. of Cincinnati, Ohio, and Frankel Brothers & Co., Inc. of Rochester, New York, are, in turn, members of NARI and each is engaged in the recycling of solid waste materials and recovery of useful resources from discarded solid wastes which otherwise would have to be burned, buried or similarly disposed at public expense, with obvious adverse effects upon the environment.

Over the years since 1968, NARI, numerous other private recycling and environmental organizations, and various agencies of the Federal Government (including the President's Council on Environmental Quality, the Environmental Protection Agency, the Departments of Commerce and Interior and the General Services Administration) have repeatedly petitioned the Interstate Commerce Commission *not* to license or approve any further across-the-board annual percentage increases in railroad freight rates for the transportation of recyclable materials until the Commission first takes effective action to correct the grossly discriminatory, unreasonable *base rates* charged by the railroads for such transportation, which rates have historically impeded and stifled the marketing of recyclable commodities and artificially stimulated the utilization and depletion of competing, scarce virgin natural resources, again with serious adverse effects on the environment.

The Commission and the railroads have been completely impervious to these pleas. The railroads have continued to seek and the Commission has approved, without first investigating the unlawful nature of the *base rate structure,* the following annual percentage increases in rates charged for the transportation of recyclable commodities:

ICC Case No.	Year	Increase In Waste Paper Rates	Increase In Non-Ferrous Metal Scrap Rates
Ex Parte 256	1967	3%	3%
Ex Parte 259	1968	5%	5%
Ex Parte 262	1969	6%	6%
Ex Parte 265	1970	6%	6%
Ex Parte 267	1971	11%	11%
Ex Parte 281	1972	2.5% surcharge plus 3%	2.5% surcharge plus 3%

The evidence developed in this case, however, now demonstrates clearly that, as repeatedly asserted by

NARI and the others mentioned above, these constant annual rate increases have been extremely damaging to the pre-existing discriminatory rate structure in that they have operated substantially to broaden the *net disparity* in rates which already existed between those charged by the railroads for the transportation of recyclable commodities and those simultaneously charged for the transportation of competing virgin materials. That evidence, obtained from the Interstate Commerce Commission itself, shows:[1]

> (1) That during the period from 1959 through 1971, the *net disparity* in *average rates* charged for the transportation of competing *woodpulp* and *waste paper* grew from 13.9¢ per hundred pounds to 18.6¢ per hundred pounds, the *actual average rates* charged per hundredweight being as follows:

Year	Woodpulp	Waste Paper
1959	17.4¢	31.3¢
1971	24.4¢	43.0¢

> (2) That during the same period (1959-1971), the *net disparity* in *average rates* charged for the transportation of competing *non-ferrous metal virgin ores and concentrates* and *non-ferrous metal scrap* grew from 13.3¢ per hundred pounds to 17.7¢, the *actual rates* per hundredweight being as follows:

Year	Virgin Ores	Scrap Metal
1959	51.7¢	65.1¢
1971	70.3¢	88.0¢

In 1966, while the railroads and the Commission were proceeding in the manner just described, Congress passed the National Environmental Policy Act (42

[1] See Commission's Environmental Impact Statement, *Ex Parte 281*, pgs. 84, 85.

U.S.C. § 4321 et seq.). That statute states, at 42 U.S.C. § 4331(b):

> "(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may— . . . .
>
> (6) *enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.*" (Emphasis supplied.)

Section 102 of NEPA (42 U.S.C. § 4332) thereupon provides:

> "The Congress authorizes and directs that, to the fullest extent possible:
>
> "(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and
>
> "(2) all agencies of the Federal Government shall— . . .
>
> "(C) include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes."

Shortly after NEPA became effective, therefore, parties appearing before the Commission in important railroad cases contended that the Commission could no longer completely ignore relevant environmental considerations in its decision-making process, and that henceforth its major actions necessarily had to be supported by Environmental Impact Statements prepared as directed by NEPA. The Commission, however, exhibited almost complete disdain for the new federal statute, and as early as 1971, it sought to intervene in *Greene County Board* v. *Federal Power Commission,* C.C.A. 2, 1971, 455 F.2d 412, cert. denied 409 U.S. 849—a case wherein the Federal Power Commission was seeking to avoid regulatory agency compliance with NEPA. ICC's intervention was rejected, however; the

Second Circuit ruled against FPC's position, and this Court denied certiorari.

In *City of New York* v. *United States,* 337 F. Supp. 150 (D.C., N.Y. 1972), a case involving proceedings before the Interstate Commerce Commission itself, the Commission directly defied NEPA and endeavored to license the abandonment of railroad facilities without the preparation of a supporting Environmental Impact Statement. A Three-Judge Court in New York criticized the Commission for its "slow reaction" to the directives of NEPA and stated that the Commission was powerless to "disregard . . . the law" (337 F. Supp. 158-160). The Court remanded the case to the Commission, stating, at 337 F. Supp. 160:

"To permit an agency to ignore its duties under NEPA with impunity because we have serious doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act and encourage further administrative laxity in this area. . . . In any event, preservation of the integrity of NEPA necessitates that the Commission be required to follow the steps set forth in § 102, even if it seems likely that those steps will lead it to adhere to the present result. Thus, this proceeding must be remanded to the Commission for it to bring itself into compliance with the law."

Albeit the District Court's decision in *City of New York, supra,* was rendered on January 20, 1972, the Commission nevertheless proceeded 12 days later (on February 1, 1972) in the case at bar *(Ex Parte No. 281, Increased Freight Rates, 1972)* to license another increase in rates for the transportation of recyclables *without preparing any Environmental Impact Statement under NEPA.* The Commission instead relied

on the same type of terse, unsupported conclusion it made in *City of New York, supra,* to wit, that, in the Commission's opinion, the challenged rate increase "*would have no significant adverse effect . . . on the quality of the human environment within the meaning of NEPA*" (See 341 I.C.C. 288, 314). On April 24, 1972, that rate increase was extended in duration, again without any effort on the part of the Commission to comply with NEPA.

The Commission's continued defiance of the law in *Ex Parte 281* thus led to the commencement of this action by the original plaintiffs S.C.R.A.P. Faced with this litigation, the Commission suddenly promised both the District Court and the Chief Justice of this Court that it intended to comply with all of the requirements of NEPA before it issued its final report in *Ex Parte 281* with reference to the allowance of permanent rate increases for 1972 (See *S.C.R.A.P.* v. *United States,* 346 F.Supp. 189, 198). Thereafter, however, the Commission flatly ignored those promises, and when it rendered its final report on October 4, 1972, it supplied no supporting Impact Statement under NEPA. Once again, it retreated to its old rejected, unsustainable *City of New York* position by stating (341 I.C.C. 288, 314):

> "Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have *not* included in our Report an extensive formal impact statement."

In the meantime, in still another case simultaneously pending in the United States District Court for the Southern District of New York (*Harlem Valley Transportation Association* v. *Stafford, Chairman, Interstate Commerce Commission),* the Commission was contending, *this time directly contrary to the position taken by the Department of Justice in the same case,* that it had no obligation to prepare any Impact Statements under NEPA until it reached its final decisions in cases, i.e., the Commission had no duty under NEPA to prepare draft Impact Statements at earlier stages of Commission proceedings. That contention was bluntly rejected by the District Court on June 21, 1973, and its decision was affirmed by the Court of Appeals for the Second Circuit on June 18, 1974 (See *Harlem Valley Transportation Association, et al.* v. *Stafford, Chairman, Interstate Commerce Commission,* C.C.A. 2, Docket No. 73-2496, decision rendered 6/18/74). In its opinion, the Second Circuit stated:

> ". . . (W)hile we recognize there are limits to what may reasonably be expected from agency compliance with NEPA, we cannot excuse . . . noncompliance with NEPA such as the ICC here seeks to justify."

In the case at bar, when the Commission once again failed to support its Final Report in *Ex Parte 281* with any Environmental Impact Statement under NEPA, protesting petitions were filed with the Commission by the Council on Environmental Quality, the Environmental Protection Agency, appellees NARI et al. and others (See 353 F. Supp. 320, 321). Plaintiffs S.C.R.A.P. went further and filed a motion for injunctive relief with the District Court in this action. At that point, the Commission suspended its Final Report and Order of October 4, 1972 in *Ex Parte 281* as they applied to recyclable commodities until it could further evaluate the situation under NEPA.

It was therefore with this background of arbitrary, capricious resistance and opposition to all of the basic requirements of NEPA coupled with its deaf refusal to respond in any way to the persistent pleas it had repeatedly received over the years *not* to license any further increases in rates for the transportation of recyclable commodities until it first eliminated the basic rate discriminations involved, that the Commission belatedly set out to prepare an Environmental Impact Statement which might somehow be construed as sufficient to support the groundless conclusions it had already reached and expressed in its suspended Final Report in *Ex Parte 281.*

Appellee NARI, cognizant of that background and fearful of the Commission's true motives, promptly asked the Commission whether it intended to hold a hearing on the environmental aspects of this case before it issued any further statements in this matter under NEPA. In this regard, in *City of New York* v. *United States, supra,* when the Commission was ordered by a District Court to comply with NEPA, the Commission, upon remand, immediately scheduled a hearing at which "All parties were given full opportunity to present expert evidence on the environmental aspects of the case" (See 344 F.Supp. 929, 938). But here, the Commission summarily rejected NARI's request for a hearing, stating the Commission intended to proceed entirely *ex parte.*

It was thus hardly surprising that soon thereafter, on March 5, 1973, the Commission issued a draft Environmental Impact Statement in this case which both the Council on Environmental Quality and the Environmental Protection Agency and others labeled totally "inadequate" and otherwise violative of NEPA.

The Commission, plainly accustomed to such low grades under NEPA, nevertheless issued the said Impact Statement in final form on May 2, 1973, over the vigorous dissent of two of its own Commissioners and the abstention of a third.

The Commission thereupon reinstated its original Final Report in *Ex Parte 281* and licensed still another 3% permanent increase in freight rates for recyclable commodities. This sixth successive increase since 1968 imposed another $9,600,000 a year in unlawful, grossly discriminatory freight rates upon the recycling industry, without any effort on the part of the Commission to investigate and correct the discriminatory nature of the aggravated base rate structure.

Appellees promptly filed motions for summary judgment and appropriate injunctive relief in the District Court. On February 19, 1974, the Three-Judge Court ruled that *"the Commission's efforts to meet the commands of NEPA were substantially deficient."* The case was thus *remanded* to the Commission *"for fulfillment of its NEPA obligations"* (371 F. Supp. 1291).

The District Court, however, *refused to grant any injunctive relief,* stating:

> "However, because of our uncertainty concerning the meaning of the Supreme Court's decision last term in *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 93 S. Ct. 2367, 37 L. Ed. 2d 350 (1973), we refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration."

ARGUMENT

I.

This Court Lacks Jurisdiction Over Appellants' Direct Appeals Under 12 U.S.C. § 1253

Both Government appellants and railroad appellants rely exclusively on 28 U.S.C. § 1253 to support their direct appeals to this Court from the District Court's judgment of February 19, 1974.[2] But 28 U.S.C. § 1253 allows direct appeals to this Court *only* from judgments "*granting or denying . . . an interlocutory or permanent injunction.*"

These two appeals, however, are not appeals "from an order granting or denying . . . an . . . injunction." While the District Court did deny an injunction which had been sought by appellees (371 F. Supp. 1307-10), *appellees have not perfected appeals from that denial.*

Appellants, on the other hand, having clearly prevailed on the injunction issue below so that the railroads are *still* collecting the new rate increase of $9,600,000 a year authorized by the Commission, have no standing to appeal from that massive victory (*Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 59 S. Ct. 480, 83 L.Ed. 608 (1939); *Gunn* v. *University Committee To End The War*, 399 U.S. 383, 391, 90 S.Ct. 2013 (1970); *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970). Indeed, the District Court expressly ruled at 371 F.Supp. 1291, 1293:

> ". . . (W)e refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration."

[2] Government's Jurisdictional Statement, p. 2; Railroads' Jurisdictional Statement, p. 2.

Patently therefore both direct appeals to this Court must be dismissed for lack of jurisdiction under 28 U.S.C. § 1253 (*Public Service Commission* v. *Brashear, supra; Hutcherson* v. *Lehtin*, 399 U.S. 522, 90 S.Ct. 2238 (1970); *Rockefeller* v. *Catholic Medical Center, supra*).

The two cases upon which appellants rely to support their jurisdictional claims are plainly inapposite because both involved appeals from orders "granting or denying . . . an . . . injunction." *Baltimore & O.R.R.* v. *U.S.*, 386 U.S. 372 (1967) involved an appeal by losing parties who had sought an injunction which was denied by the court below. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), in turn, involved two cases, one in which an appealing party requested injunctive relief that was denied, and the other in which the Interstate Commerce Commission had opposed an injunction that was granted by the District Court.

II.

The District Court's Judgment Should Be Affirmed or the Appeals Should Be Dismissed Because the Issues Presented for Review Are Not Substantial.

In addition to the fatal jurisdictional barrier discussed hereinabove, the instant motion should be granted because the two appeals do not present substantial questions for review by this Court.

Essentially, the only real question again presented by appeallants is whether the Interstate Commerce Commission, like all other federal agencies, is subject to the National Environmental Policy Act, 42 U.S.C.

4321 et seq., so that it must follow the procedures prescribed by that federal statute and thus fairly develop and prepare environmental impact statements to support its major federal actions.

Clearly, this same basic question, raised time after time in the past, has already been firmly resolved against appellants by the decisions in *Greene County Board* v. *Federal Power Commission,* 455 F.2d 412 (2d Cir.), cert. denied 409 U.S. 849; *City of New York* v. *United States,* 337 F.Supp. 150 (S.D.N.Y., 1972); and *Harlem Valley Transportation Association* v. *Stafford, Chairman, Interstate Commerce Commission,* 2d Cir., June 18, 1974, Docket No. 73-2496).

The correctness of these recent decisions is not subject to doubt. As this Court recognized in *United States* v. *S.C.R.A.P.,* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), the "policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies" (See 93 S.Ct. 2419; 42 U.S.C. § 4335); and Congress specifically directed all federal agencies, with no exemption of the Interstate Commerce Commission, to take all actions necessary to conform their existing authority and administrative procedures to the requirements of NEPA (See 42 U.S.C. § 4333). Thus, this Court readily assumed in *S.C.R.A.P.* that *"there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not"* (See 93 S.Ct. 2420).

And, of course, this is precisely what the District Court has now done in the case at bar. It exercised its "general judicial power to determine if the [ICC] has complied with NEPA," and when it found that the

Commission had *not* correctly complied, is simply remanded the case to the Commission for further proceedings consistent with the requirements of NEPA (See *S.C.R.A.P.* v. *United States,* 371 F. Supp. 1291 (1974)).

In line with the holding in *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Commission,* 146 U.S. App. D.C. 33, 38, 449 F.2d 1109, 1114 (1971), the District Court ruled that NEPA "sets a high standard for the agencies, a standard which must be vigorously enforced by the reviewing courts." It also held, consistent with *Greene County Board* and *Calvert Cliffs, supra,* that the ICC, like other federal agencies, must meet the procedural requirements of NEPA "fully and in good faith," and its environmental impact statement cannot be prepared in an arbitrary, capricious manner, and it cannot be sustained if it patently gives insufficient weight and attention to environmental values (See 146 U.S.App.D.C. at 39, 449 F.2d at 1115).

The District Court carefully restricted its review of the Commission's impact statement to matters of *procedure* under NEPA and it expressly avoided "any substantive review," albeit federal courts in other circuits previously extended their review of NEPA impact statements to matters of *substance* (See *Conservation Council of North Carolina* v. *Froehlke,* 4 Cir., 473 F.2d 664, 665 (1973); *Environmental Defense Fund Inc.* v. *Froehlke,* 8 Cir., 473 F.2d 346, 353 (1972)).

In essence, therefore, the District Court found that in this case the Commission, which initially doggedly refused to comply with NEPA at all, was now guilty of mere *pro forma* compliance (See *App. A, Govt's J.S., pg. 28a*); that, contrary to *Greene County Board* and

Calvert Cliffs, supra, the Commission's impact statement is "deficient"; it does not contain "individualized good faith consideration and balancing of environmental factors"; it is combative, defensive and advocatory"; and does not respond in any respect to suggestions and recommendations made in good faith by other federal agencies (See *App. A, Govt's J.S., pgs. 28a-39a*).

Moreover, the District Court found that the Commission arbitrarily and capriciously failed to give any consideration whatsoever to the *discriminatory, debilitating underlying rate structure* before it prepared and finally adopted its *pro forma* impact statement under NEPA. In this connection, the District Court stated (See *App. A, Govt's J.S., pgs. 34a-39a*):

> "It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment, then the increases would at least presumptively aggravate that contribution. . . . The Commission's failure to hold down the rate increases on recyclables would thus have a cumulative impact on the environment. Such cumulative impacts must be considered in NEPA statements. . . .
>
> "The necessity for the Commission to consider the environmental impact of the underlying rate structure before approving rate increases on recyclable commodities is further underscored by the recent enactment of Public Law 93-236, 93rd Congress, the Regional Rail Reorganization Act of 1973. Section 603 of the Act requires the Commission to 'adopt appropriate rules' to 'eliminate discrimination against the shipment of recyclable materials in rate structures . . . where such discrimination exists.' This provision is a legislative recognition of discrimination against recyclables in the existing railroad rate structure and a legislative direction to the Commission to eliminate it. The responsibility imposed by NEPA upon the commission to 'approach the maximum attainable recycling of depletable resources,' 42 U.S.C. § 4331(b)(6), surely cannot be fulfilled unless this provision is complied with before rate increases on recyclable commodities are approved."

Thus, the District Court acted properly and correctly when it rejected the Commission's *pro forma*, arbitrary, incomplete environmental impact statement, and when it simply remanded this case to the Commission for further administrative proceedings consistent with the requirements of NEPA and Section 603 of Public Law 93-236, referred to in the last mentioned excerpt from the District Court's opinion.

Plainly, therefore, there is absolutely no substance to the railroads' contention that the "lower court had no authority to act in this case." There is nothing whatever in the Interstate Commerce Act or any other statute which prevents judicial review of a federal agency's compliance or non-compliance with NEPA. Indeed, as stated above, this Court indicated in *United States* v. *S.C.R.A.P., supra,* that "there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not" (See 93 S.Ct. 2420).

Nor is there any validity to the Government's hollow contention that the District Court's decision somehow "denies the railroads the benefit of timely general revenue orders." In the case at bar, the District Court denied injunctive relief *and expressly allowed the railroads to go ahead with the collection of the challenged rate increases while the Commission reconsiders the case under NEPA.* If the Commission *now* comes to grips *in this case* with the discriminatory nature of the

underlying base rate structure, there will be no delays in future cases because all of the relevant facts will have been developed here, for use by the Commission and the parties, in this case and in all future rate proceedings. Thus, in the final analysis, the District Court's order to the Commission in this case will actually resolve that issue once and for all, and will thus result in substantial time savings in future rate increase proceedings.

Finally, the Government's hearing contentions are completely specious. In *City of New York, supra,* the Interstate Commerce Commission, on its own motion, expeditiously held a full hearing to develop the facts it and the parties there involved deemed necessary for inclusion in a NEPA statement *after* the Commission was firmly ordered by the court in that case to comply with NEPA. Also, the Commission regularly holds hearings in rate increase proceedings under Section 15(7) of the Interstate Commerce Act, so there is nothing strange or unusual about the District Court's hearing directive to the Commission in the instant Section 15(7) case. Finally, this Court denied certiorari in *Green County Board, supra,* where the Second Circuit ruled, at 455 F.2d 422, just as the District Court has now done in the case at bar:

> "... [W]e conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement...
>
> "... [T]he [impact] statement may well go to waste unless it is subject to the full scrutiny of the hearing process...."

CONCLUSION

The motion to dismiss or affirm should be granted.

Respectfully submitted:

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